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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MT. HAWLEY INSURANCE COMPANY, Plaintiff and Respondent, v. GEMINI INSURANCE COMPANY, Defendant and Appellant.	B218416 (Los Angeles County Super. Ct. No. BC378825)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Thornton House, Judge. Affirmed.

Charlston, Revich & Wollitz, Howard Wollitz, Allan J. Favish and Jefferson M. Shelton for Defendant and Appellant.

Greco Traficante Schulz & Brick, Paul A. Traficante and Jon S. Brick for Plaintiff and Respondent.

In this declaratory relief action between two liability insurers, the appellant, Gemini Insurance Company (Gemini), seeks reversal of a judgment declaring that it owed a defense to California Construction Partners (California Construction), a sub-contractor sued in the underlying construction defect case. The respondent, Mt. Hawley Insurance Company (Mt. Hawley), filed this action alleging that Gemini had wrongfully refused to participate in the defense of the underlying action brought against California Construction, which was a common insured of the two insurers.

The critical issue presented by this appeal turns on the question of coverage for the claims made against California Construction under Gemini's policy. The trial court, in a one-day bench trial, ruled in favor of Mt. Hawley and made findings of fact that preclude application of the policy exclusion upon which Gemini relies. The record contains substantial evidence to support the trial court's findings and we therefore will affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In 2003, California Construction entered into a contract with Taisei Construction Company (Taisei), the general contractor, to perform certain work on an apartment complex known as The Marlowe.[2] This work was performed during the period August

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[1] The facts that we recite are not in dispute and the issue presented by this appeal is a legal one, turning upon the proper interpretation of Gemini's policy and applying it in light of the trial court's findings of fact.

[2] The record reflects that California Construction contracted to install sheet metal roof mansards, rain guards/down spouts and A/C paths for air conditioning condensers at The Marlowe which was located at 445 North Rossmore in Los Angeles, California.

2003 through August 2004. In February and March of 2005, following the conclusion of its original work, some damage from roof leaks and water intrusion was discovered and California Construction was asked to return to the job site in order to perform warranty work plus some additional water protection work with respect to areas that had *not* suffered any leakage or water intrusion problems. This work was all completed by August 2005.

Both Mt. Hawley and Gemini provided liability insurance to California Construction. Mt. Hawley's policy covered the period December 4, 2003 to December 4, 2004. Gemini's policy provided coverage for the period February 7, 2006 to February 7, 2007.[3] The commercial general liability policy issued by Gemini contained an endorsement entitled "Exclusion – Continuous or Progressive Damage Claims." It consisted of two paragraphs which provided:

"[1] In the event of any claim against the insured for bodily injury, property damage, personal injury or advertising injury which is or is alleged to be continuing in nature, this policy shall not apply to any such claim if the damage or any portion of it began or is alleged to have begun prior to the date that this policy becomes effective. This exclusion shall apply whether or not the cause of the alleged damages was known prior to the effective date of the policy.

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[3] A third insurer (not involved in this appeal), Landmark American Insurance Company (Landmark), also provided liability coverage for California Construction. Its coverage period was February 3, 2005 to February 3, 2006.

"[2] We have no duty to defend any insured against any loss, claim, 'suit', or other proceeding alleging damages arising out of or related to 'bodily injury', 'property damage', 'personal injury' or 'advertising injury' to which this exclusion applies."

On December 22, 2006, the owners of The Marlowe filed the underlying construction defect action in which California Construction was named as a defendant.[4] The complaint alleged the existence of construction defects which included work performed by California Construction.[5]

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[4] The underlying action named Taisei, the general contractor, and others including California Construction. Taisei then filed a cross-complaint naming California Construction as a cross-defendant.

[5] For example, paragraph 32(e) of the complaint in the underlying action alleged: "Sheet metal parapet caps were improperly installed throughout, permitting water intrusion into the structure and causing dry rot. The sheet metal flat roof drip edges and eyebrow window flashings were also improperly installed and permit water intrusion. The sheet metal flat roof drip edges slope to the building and allow an accumulation of water at contact with the building. Over time, this contact has caused deterioration of the interface and water intrusion has resulted." ¶ Paragraph 32(h) of the complaint in the underlying action also alleges: " 'The standing seam metal roof/mansard was improperly installed in a manner that permits water intrusion.' " ¶ In Paragraph 113, the complaint in the underlying action includes the following allegation regarding when damages were discovered: ¶ "The defects were present in the structure from the time construction was substantially completed in or about August 2004. Plaintiff is informed and believes, and based on such information and belief alleges, that notice was given to California Construction Partners . . . of the defects in The Marlowe after the rains of the 2004-2005 winter season from December 2004 until through March 2005 revealed the extent of water intrusion at The Marlowe."

Defense of the underlying action was tendered to both Mt. Hawley and Gemini in June of 2007. Mt. Hawley accepted the tender and agreed to provide a defense. Gemini did not and it likewise did not accept a second tender made in August of 2007.[6]

On October 10, 2007, Mt. Hawley filed this action against Gemini seeking a declaratory judgment establishing (1) the rights and obligations of the two insurers[7] under their respective policies and that (2) Gemini had a full and complete duty to defend California Construction in the underlying action. On January 3, 2008, Gemini sent a formal letter to California Construction denying coverage on the ground that the claim against it in the underlying action fell within the clear and explicit terms of the "Continuing Loss" exclusion in the policy. The specific language from that exclusion on which Gemini relied provided: "In the event of any claim against the insured for . . ., property damage, . . . *which is or is alleged to be continuing in nature*, this policy shall not apply to any such claim *if the damage or any portion of it began or is alleged to have begun prior to the date that this policy becomes effective*. This exclusion shall apply whether or not the cause of the alleged damages was known prior to the effective date of the policy. [¶] We have no duty to defend any insured against any loss, claim,

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[6] A defense of the underlying action had also been tendered to Landmark which initially had refused to accept it. Later, Landmark did join Mt. Hawley in providing a defense to the underlying action.

[7] Initially, Mt. Hawley had also named Landmark as a defendant, but in December 2008, it voluntarily dismissed that insurer from its declaratory relief action. As already noted, Landmark is not involved in the appeal.

[or] 'suit', . . . *arising out of or related to* . . . 'property damage' . . . *to which this exclusion applies*." (Italics added.)

Mt. Hawley's motion for summary judgment was denied. Thereafter, the case proceeded to a one-day non jury trial on February 9, 2009. The trial court found that the *original* complaint in The Marlowe's underlying action alleged only continuous property damage commencing before the Gemini policy period and therefore did not create a potential for coverage under the policy, given the language of the continuous loss exclusionary clause. Thus, Gemini's original denial of coverage and a defense was justified. The court further found, however, that new evidence discovered in October 2008, and made known to Gemini for the first time on the date of trial (by means of the testimony of California Construction's attorney in the underlying action, Marla B. Shah), did create a potential for coverage with respect to some aspect of the damages claimed by The Marlowe. Such potential for coverage necessarily established the duty to defend. Therefore, Gemini had a duty to provide a defense in the underlying action (which apparently is still ongoing) *from and after February 10, 2009*.[8] A judgment declaring that obligation was thereafter entered. Gemini filed a timely appeal.

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[8] The trial court's statement of decision reflects its reasoning: "The court finds that [Ms. Shah] testimony establishes that it is more likely than not that the discovery of and the instances of damage to [The] Marlowe related to [California Construction's] workmanship arising during the time period covered by the Gemini policy exists. Mt. Hawley has never maintained that all of the damages alleged in [The] Marlowe Action fall under the auspices of the Gemini Policy, nor can they based upon the evidence presented at this trial. ¶ Specifically, Ms. Shah related that in October 2008, she was present at a mediation dubbed by the construction industry as a "show and tell" presentation by the window manufacturing's expert and counsel. At that mediation, they were provided with a supplemental defect list and additional damages in which it is

CONTENTIONS OF THE PARTIES

This case presents a single, specific legal issue. Does the "continuous loss" exclusionary language of the Gemini policy preclude coverage of the claims asserted in the underlying action against California Construction? Both parties agree that this is the issue presented and that the proper standard of review is de novo.

The parties differ as to how broadly we should read that exclusionary language. Mt. Hawley essentially argues that the exclusion should not be read to apply to any damage that commenced *after* the inception of the Gemini policy and, since the trial

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claimed that [California Construction's] work product related to sheet metal placed along the patio/balcony areas, and the work related to the French doors in addition to the eyebrow flashing was defective and causing damage to most related systems and the stucco. ¶ These defects appeared to have been discovered in the course of deconstructive testing. The October 2008 mediation revealed that damages related to the work [done] with respect to the planter boxes on the main floor, the windows, the balustrades and the stucco with attendant damages/defects were new and the discovery of them – and the arguments made about them by the parties to the litigation – occurred during the 2006-2007 timeframe. Indeed, Ms. Shah testified that *[T]he Marlowe plaintiffs have amended the original complaint* and do contend that not only the 2004-2005 rainy season but subsequent rainy seasons have causes [sic] new problems and damages, thus arising within the Gemini policy period. . . . ¶ . . . Ms. Shah's testimony (in combination with Mr. Rios' testimony) establishes the potential for coverage and thus, the duty to defend. The issue then becomes, did that duty arise any sooner? No evidence exists to show that Gemini was aware of the allegations made at the October 2008 mediation, the need for [California Construction] to obtain additional experts with respect to the windows, stucco, planter boxes, and balustrades. Further, no evidence was presented that defendants were aware of [California Construction's] counsel belief that evidence existed to show damage arising (not of a continuous nature) within the coverage period before [Ms. Shah's] testimony at this trial. Therefore, the evidence supports and only supports a prospective duty from the date of the trial. Mt. Hawley's request for fees and costs incurred prior to the time of this trial must be declined."

court found that such circumstance existed, Gemini had a duty to defend, at least from and after February 10, 2009.

Gemini, on the other hand, contends that, given the clear and explicit exclusionary language (including, particularly, the second paragraph of the exclusionary provision), it should not have to defend a suit that alleges that California Construction caused continuing property damage, a portion of which is alleged to have begun prior to the date the Gemini policy became effective. Gemini argues that it does not matter if the suit also alleges that California Construction's defective workmanship caused property damage that did not occur until after the inception of the Gemini policy period.

As we explain below, we agree with Mt. Hawley and will affirm the judgment.

DISCUSSION

1. *The Trial Court's Ruling*

Mt. Hawley is seeking to recover from Gemini a contribution towards the defense expenses that have been (and will be) incurred with respect to the defense of California Construction in the underlying action. If Gemini owes any duty to defend, then it is obligated to share that burden on some equitable basis (to be determined by the trial court) with Mt. Hawley. The trial court expressly found, based on substantial evidence, that a potential for coverage existed and that Gemini first became aware of such fact on February 9, 2009. As a result, Gemini had a duty to defend the common insured. The trial court, however, limited Gemini's obligation to those defense expenses incurred on or after February 10, 2009. Mt. Hawley has not filed

a cross-appeal on the issue and has not otherwise raised an objection to that determination in its respondent's brief.

2. *General Principles*

We interpret an insurance policy using the same rules of interpretation applicable to other contracts. (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390 (*Powerine*).) Our goal is to give effect to the mutual intention of the contracting parties at the time the contract was formed. (Civ. Code, § 1636; *Powerine, supra*, at p. 390.) We ascertain that intention solely from the written contract if possible, but also consider the circumstances under which the contract was made and the matter to which it relates. (Civ. Code, §§ 1639, 1647.) We consider the contract as a whole and interpret its language in context so as to give effect to each provision, rather than interpret contractual language in isolation. (*Id.*, § 1641.) We interpret words in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. (*Id.*, § 1644.)

A liability insurer has a duty to defend a suit against its insured if facts alleged in the complaint, or other facts known to the insurer, potentially could give rise to policy coverage. (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 654-655 (*Scottsdale*); *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275-277.) "It has long been a fundamental rule of law that an insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.) The duty to defend is both separate from and broader than

a duty to indemnify. (*Ibid*.) (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081.) To prevail in a duty to defend action "the insured must prove the existence of a *potential for coverage,* while the insurer must establish *the absence of any such potential.* . . . [T]he insured need only show that the underlying claim *may* fall within the policy coverage; the insurer must prove it *cannot*." (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300 (*Montrose*) (Italics in original).)

Although a determination of an insurer's duty to defend usually involves comparing the allegations of the complaint with the terms of the policy, any extrinsic evidence known from any source can trigger a duty to defend, even if the complaint does not facially indicate a potential for covered damages. (*Montrose, supra,* 6 Cal.4th at p. 295; *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 110, fn. 52.)

The insurer must defend the entire action even if only one of several claims is potentially covered. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 49.) The duty to defend the entire action is implied in law in order to ensure that the defense of claims that are at least potentially covered will be both meaningful and immediate. (*Ibid.*) If there is any ambiguity in the policy with respect to the duty to defend, we must resolve the ambiguity in accordance with the objectively reasonable expectations of the insured. (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 869.)

3. *The Exclusionary Provision Does Not Clearly Preclude A Duty to Defend*

Here, the exclusion upon which Gemini relies provides that it applies to a claim for property damage " . . . which is or is alleged to be *continuing in nature* . . . . "

(Italics added.) The trial court found from evidence presented at trial that the complaint in the underlying action had been amended to allege *new* damages resulting to The Marlowe that had first occurred during the Gemini policy period.

The first paragraph of the continuous damage exclusion (quoted in full *ante*) states that the policy does not apply to any "claim" for property damage or other injury that is or is alleged to be continuing in nature if the damage or any portion of the damage began or is alleged to have begun before the policy period. This provision precludes coverage for claims for continuous property damage commencing before the policy period, but does not preclude coverage for claims for property damage (whether continuous or noncontinuous) commencing during the policy period. While Gemini does argue that the first paragraph of the exclusion precludes a duty to defend the underlying action, it relies primarily on the second paragraph.

That second paragraph (also quoted in full *ante*) states that Gemini has no duty to defend the insured against any "loss, claim, 'suit', or other proceeding" seeking damages for property damage or other injury to which the exclusion applies. Gemini interprets this to mean that if the underlying action includes a claim that is excluded under the first paragraph of the exclusion (i.e., a claim for continuous property damage commencing before the policy period), Gemini has no duty to defend any part of the underlying action. Gemini argues that it has no duty to defend in those circumstances even if the underlying action also includes a claim for property damage first occurring during its policy period.

Essentially, Gemini's argument is that the exclusionary clause should be broadly construed so as to apply to *all* water damage that occurred to The Marlowe after California Construction completed its work even though that damage occurred for the *first time* during the Gemini policy period and arose from work done by California Construction that was not involved in the original damage claims. In our view, the second paragraph of the exclusion expressly precludes a duty to defend any claim that is excluded under the first paragraph, but does not clearly or unambiguously address the situation where a suit includes both an excluded claim and a claim that is not excluded under the first paragraph. The reference to a " 'suit' . . . alleging damages arising out of or related to . . . 'property damage' . . . to which this exclusion applies" reasonably could be interpreted to be limited to a suit alleging only excluded damages. This is true particularly in light of the anomaly that would result if the existence of an excluded claim relieved Gemini of the duty to defend even claims for which its policy actually provided coverage, as would be the case under Gemini's interpretation. Absent policy language explicitly stating that this would be the result, we conclude that Gemini's interpretation is contrary to the objectively reasonable expectations of the insured.

"An insurer cannot escape its duty to insure by means of an exclusionary clause that is unclear. . . . [sic] [T]he burden rests upon the insurer to phrase exceptions and exclusions in *clear and unmistakable* language. . . . The exclusionary clause 'must be *conspicuous, plain and clear*.' " (*State Farm Mut. Auto. Ins. Co. v. Jacober* (1973) 10 Cal.3d 193, 201-202; see also *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204.)

An insurer "may rely on an exclusion to deny coverage only if it provides *conclusive evidence* demonstrating that the exclusion applies." (*Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1038-1039.) "Thus, an insurer that wishes to rely on an exclusion has the burden of proving, through conclusive evidence, that the exclusion applies in all possible worlds." (*Id.*, at p. 1039.) Gemini is relying upon an exclusion in its policy to deny coverage, and such an exclusion must be strictly construed in favor of coverage. (*E.M.M.I., Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465,471.)

Gemini cannot meet this standard in light of the express finding that there were allegations in the underlying action of new damage to The Marlowe related to California Construction's workmanship that first arose during the Gemini policy period. This finding was based on evidence presented at trial, including evidence that The Marlowe had amended its complaint in the underlying action to so allege.[9] Based on this finding, the trial court concluded that a potential for coverage under the Gemini policy existed and therefore Gemini had a duty to defend.[10]

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[9] We have quoted above the portion of the trial court's Statement of Decision which describes this evidence. (See fn. 8, *ante*.)

[10] We note that the trial court did not read or consider the issue of the nature and extent of Gemini's liability to Mt. Hawley for equitable contribution that will be a matter for resolution in subsequent proceedings.

DISPOSITION

The judgment is affirmed. Mt. Hawley shall recover its costs on appeal.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.